IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MATTHEW WILLIAM OYER, Appellant.	)	No. 62434-2-I DIVISION ONE UNPUBLISHED OPINION FILED: July 27, 2009

Appelwick, J. — Matthew Oyer pleaded guilty to one count of attempted malicious mischief in the second degree. On appeal, he challenges the sentence, arguing that he was denied effective assistance of counsel, that the restitution award was not supported by substantial evidence, and that the trial court improperly delegated its authority to the Department of Corrections. Finding no error, we affirm.

FACTS

On May 18, 2007, Oyer threw a traffic cone into the window display of Ferrari & Maserati of Seattle, breaking the glass and causing damage to a black Ferrari. The State charged Oyer with attempted malicious mischief in the

second degree.

Oyer pleaded guilty. Oyer stated that "[o]n May 18, 2007, in King County, Washington, I did attempt to knowingly and maliciously cause physical damage in excess of [sic] to a window and a motor vehicle, the property of Ferrari of Seattle."

After his guilty plea but prior to sentencing, Oyer paid $6,923 for damage to the window.

A King County court gave Oyer a 12 month suspended sentenced and placed him on 12 months of supervised probation with the Department of Corrections (DOC). Additionally, Oyer was ordered to serve two days in jail, to perform 160 hours of community service, to refrain from possessing or using alcohol or nonprescribed drugs, to provide a recently completed substance abuse evaluation to probation and comply with the treatment recommended in that evaluation, to pay a $500 victim penalty assessment, and to pay restitution in an amount to be determined at a future restitution hearing. Additionally, the court ordered Oyer to make any legal financial obligation payments "[o]n a schedule established by the [DOC] if it has active supervision of the defendant, or by the county clerk." Oyer did not object to the court's proposed payment arrangement.

Eight months later, the court held a restitution hearing. Oyer was represented by a different attorney than the one at his original sentencing. The State sought restitution in the amount of $36,159. The amount included $5,000

payable to Ferrari & Maserati of Seattle for the insurance deductible associated with the cost of repainting the Ferrari, and $20,000 for the diminished value of the Ferrari caused by the damage and subsequent repair. The State additionally sought $11,159 reimbursement to the insurance company.

Oyer's counsel objected to the requested amount on the grounds that Ferrari merely sought to recoup anticipated lost profits, which is not a recoverable loss under the restitution statute.

The State presented the testimony of Tino Perrina, the sales and marketing director for Ferrari & Maserati of Seattle. Perrina testified that the damage to the vehicle required repainting, which diminished the value of the Ferrari by $20,000.

Following the testimony, the court ordered Oyer to pay the full amount of restitution sought by the State, $36,159. He appeals the restitution order.

DISCUSSION

I. Ineffective Assistance of Counsel

Oyer asserts that his attorney rendered ineffective assistance of counsel at his restitution hearing, claiming she was unfamiliar with the case and failed to meaningfully challenge the State's restitution request.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S.

668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007), review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Oyer first argues that his attorney was ineffective because she was unfamiliar with particular facts of the case and failed to conduct a reasonable investigation. Specifically, Oyer claims the following instances are indicative of the deficient performance: (1) his attorney asking the court to clarify the total exact amount the State sought in restitution, (2) counsel's apparent lack of knowledge that Oyer had already paid for the broken window, and (3) counsel's lack of knowledge of a presentence report.

But, the record is not developed sufficiently to establish the claimed error. For example, his counsel asked the court to clarify the exact amount of total restitution being sought, following an itemized listing by the State. Counsel's request for the total does not show deficient performance. Instead, a number of

alternative explanations are possible. Likewise, counsel's statement that there was "no objection to replacing the window" when Oyer had already paid for its replacement was not deficient performance when considered in the context of her argument about including lost profits in the restitution amount. Last, nothing in the record supports Oyer's assertion that his attorney failed to read the presentence report. These instances do not establish that counsel's performance was deficient or that she failed to investigate.[1]

Next, Oyer claims his attorney failed to mount a meaningful defense by failing to present evidence to counter Perrina's testimony and by making only one legal argument. Oyer argues his counsel's performance was deficient, similar to that found in the cases of In re Welfare of J.M., 130 Wn. App. 912, 125 P.3d 245 (2005), In re Pers. Restraint of Morris, 34 Wn. App. 23, 658 P.2d 1279 (1983), and In re Pers. Restraint of Brett, 142 Wn.2d 868, 16 P.3d 601 (2001).

In J.M., a termination of parental rights case, we held that a defense counsel's performance was deficient when he stipulated to the admissibility of a report containing several inadmissible opinions of experts who did not testify at trial; failed to use positive evidence in his client's favor; and during closing argument, failed to dispute the State's evidence. 130 Wn. App. at 922–25.

In Morris, an attorney failed to appear for sentencing on a rape conviction. 34 Wn. App. at 24. A private attorney who represented the defendant on a different charge was present. Id. Despite the private attorney's avowed

[1] In his statement of additional grounds, Oyer argues that his counsel was ineffective for failing to return phone calls and failing to notify him of the restitution hearing. But, the record contains nothing upon which this court can rely to review this claimed error.

unfamiliarity with the facts of the rape conviction, the court sentenced the defendant. Id. We reversed, holding that at sentencing a defendant has a right to counsel familiar with the case. Id. at 24-25.

In Brett, we held that a defendant in a death penalty case did not receive effective assistance of counsel when the attorney failed to conduct research into a potential mental health defense in a timely manner, failed to secure a qualified expert to testify, and delayed in investigating and preparing for the case. 142 Wn.2d at 877–80.

Unlike those cases, here, Oyer's counsel advocated for her client by offering a reasonable legal theory and cross-examining the State's sole witness. Oyer's attorney challenged whether a nexus existed between the broken window and the damage to the car. She also argued that the State's request for lost value amounted to restitution for lost profit, which is not recognized in the restitution statute. Oyer's attorney cross-examined Perrina, challenging how he arrived at the diminished value figure. We are not presented with facts similar to the cases on which Oyer relies. Below, Oyer's counsel was familiar with the issues and facts of the case, presented a reasonable argument about whether the restitution statute included lost profits, and questioned the State's sole witness.

Moreover, defense counsel's legitimate trial tactics cannot serve as the basis for an ineffective assistance of counsel claim. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Given the presumption of effective

representation, Oyer must establish that there was no legitimate strategic or tactical reason for the attorney's conduct. McFarland, 127 Wn.2d at 336. He fails to do so. Simply because on appeal Oyer presents alternative grounds to challenge the State's restitution request, does not render counsel's performance below deficient.

Because Oyer cannot establish that his attorney's performance was deficient, his ineffective assistance claim fails.

II. Sufficient Evidence

Oyer also claims that the restitution order is unsupported by the evidence. He argues that the trial court erred in awarding $20,000 in restitution for diminished value of the Ferrari, because Perrina provided only a rough estimate of the loss.

The authority to order restitution is statutory. State v. Marks, 95 Wn. App. 537, 539, 977 P.2d 606 (1999). RCW 9.95.210(2) authorizes a court to impose a sentence of restitution for a gross misdemeanor to "any person or persons who may have suffered loss or damage by reason of the commission of the crime." The amount of restitution must be established by substantial credible evidence; the court must not rely on speculation or conjecture. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). But, damages need not be proven with specific accuracy for purposes of determining the amount of restitution a criminal defendant must pay. State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984). We review a restitution order for abuse of discretion. State v. Enstone,

137 Wn.2d 675, 679, 974 P.2d 828 (1999).

Oyer relies on Kisor, where we held that a $17,380 restitution award for the loss of a police dog was not supported by substantial credible evidence. Kisor, 68 Wn. App. at 613-614, 620. Because the affidavit included hearsay statements relating to the costs of the dog, "[d]ue process was offended." Id. at 620. Oyer claims that his award, similarly, was not supported by substantial credible evidence, because the State entirely relied on Perrina's conclusory testimony.

But, unlike Kisor, here, Perrina testified at the restitution hearing about his own personal knowledge regarding Ferrari values. Perrina testified that, based on his 16 years of experience in the auto industry, the repainting of any car from its original factory paint reduces its value. Perrina testified that a $200,000 car is diminished in value more than an $18,000 car by repainting. Therefore, Perrina explained that "[p]rior to the damage I could have sold that car for $20,000 to $30,000 more." Unlike Kisor, Oyer had an opportunity to, and did, cross-examine Perrina to determine how he reached the figure of $20,000. We hold that the trial court did not abuse its discretion in awarding the restitution amount, because it was based on substantial credible evidence.

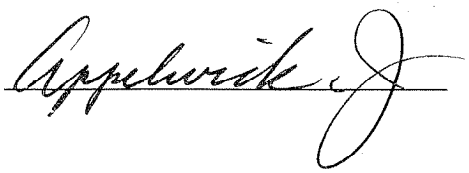
Oyer also contends that the trial court erred in applying a restitution doubling provision. Although the sentencing court referred to a restitution doubling provision as evidence that statute does not mandate that "we flyspeck these issues to the very penny," the court did not apply it. Instead, the court

awarded the amount requested by the State, which included the $20,000 for diminished value. This is the same amount that Perrina testified was his loss. No error occurred.

III. Delegation of Payment Schedule

Oyer contends that the trial court improperly delegated its judicial authority when it ordered the DOC to determine the restitution payment schedule. The argument was not raised below. We will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). To raise such an issue on appeal, the defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. Id. at 926-27. This showing of actual prejudice is what makes the error "manifest," allowing appellate review. Id. at 927. Because Oyer fails to establish the claimed error is of constitutional magnitude, we decline to review it.

We affirm.



WE CONCUR: